COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2058 **Cir. Ct. No. 03TP000013**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRITTANY L. S., A PERSON UNDER THE AGE OF 18:

WINNEBAGO COUNTY,

PETITIONER-RESPONDENT,

V.

GARY W. S.,

RESPONDENT-APPELLANT,

AMY B.,

RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Gary W. S. appeals from an order terminating his parental rights to Britanny L. S. He contends that the circuit court erred in allowing the jury to consider evidence of his prior criminal record, including two 1991 convictions for sexual assault. We affirm the circuit court's order terminating Gary's parental rights.

¶2 The essential facts are undisputed. Britanny, born on October 13, 2000, has not lived with her parents, Amy B. and Gary W. S., since January 2001. The Winnebago County Department of Human Services (the County) took temporary physical custody of Brittany on January 22, 2001, after her mother threw Brittany, at age three months, on the floor with enough force to cause a four-inch linear fracture to the right side of her skull. On May 8, 2001, the circuit court signed a dispositional order holding that Britanny was a child in need of protection or services (CHIPS), transferred her legal custody to the County, and ordered her out-of-home placement.[2]

¶3 The CHIPS dispositional order included the termination of parental rights (TPR) warning and the conditions for the return of Brittany to Gary's care. The conditions for the return of Brittany to Gary's care included that he: (1) maintain a safe and stable home for a minimum of three months prior to her return to his care; (2) complete any recommended alcohol or other drug abuse programs; (3) resolve all criminal charges and cooperate with officials and/or his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The CHIPS dispositional order was extended on April 11, 2002, and March 3, 2003.

probation or parole officer; and (4) refrain from any additional criminal behavior and/or charges.

¶4 On February 13, 2003, the County filed a TPR petition against Amy and Gary. As grounds for termination, the petition asserted that "the Court set down conditions precedent for the return of the child to the parental home" and that "the child's parent failed to demonstrate substantial progress toward meeting the Court-ordered conditions for the return of the child to the parental home." Amy consented to the termination of her parental rights. However, Gary contested the grounds for the termination of his parental rights and the matter was tried to a jury on April 14, 2003.

¶5 The County moved to admit evidence of Gary's criminal history at trial.[3] Gary's criminal history included two sexual assault offenses, carrying a concealed weapon, battery, criminal damage to property, reckless use of a weapon, and two disorderly conduct charges.[4] The circuit court admitted the evidence over Gary's objection, holding that:

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[3] Brittany's guardian ad litem also moved and argued for the admission of Gary's criminal history.

[4] Gary's probation and parole agent testified as to Gary's past criminal record:

> May of 1991, he was placed on probation for disorderly conduct and then September of 1991, the sexual intercourse with a child age 16; July, August of 1991, carrying a concealed weapon; November of 1991, sexual contact without intercourse; October of 1991, battery.
>
> January, 1993, party to the crime criminal damage to property; October of 1994, reckless use of weapon, disorderly conduct and that count was dismissed; June 12, 1998, disorderly conduct and then the disorderly conduct that I had him on for in 2002.

> All of this [evidence] goes to the level of cooperation from the father here and the likelihood of him being able to succeed within 12 months. That whole history would go to that. There's no doubt about it.
>
> ….
>
> Given the nature of that history, the nature of incarcerations, the nature of his inability, according at least to what appears is going to be presented, to deal with those issues in counseling, certainly that's relevant for a jury in terms of factoring in whether or not it has been successful and there is any likelihood of a successful period.

¶6 The jury was asked to determine whether WIS. STAT. § 48.415(2) grounds existed to terminate Gary's parental rights to Brittany. The verdict presented the following questions:

> Did the Winnebago County Department of Human Services make a reasonable effort to provide the services ordered by the court?
>
> Has the child's father, Gary [], failed to meet the conditions established for the safe return of Brittany [] to his home?
>
> Is there a substantial likelihood that the child's father, Gary [], will not meet these conditions within the 12-month period following the conclusion of this hearing?

The jury answered "yes" to all three questions.[5] The circuit court terminated Gary's parental rights on June 9, 2003. Gary contends that because the circuit court erred in admitting the evidence of his criminal history, the TPR order should be vacated.

[5] Four factual grounds are required under WIS. STAT. § 48.415(2) in order to terminate parental rights. The fourth ground, that Brittany had been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law, was answered "yes" by the court.

¶7 Whether the circuit court erred in admitting Gary's prior criminal record presents an evidentiary question. This court reviews evidentiary questions on the basis of whether there was an erroneous exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). The basic principles of relevancy, materiality and probative value apply to proof of questions of fact in termination proceedings. *See* WIS. STAT. § 48.299(4)(b). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. WIS. STAT. § 904.01. We will uphold a trial court's decision to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. ***LaCrosse County DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194, *review denied*, 2002 WI 48, 252 Wis. 2d 152, 644 N.W.2d 688 (Wis. Apr. 22, 2002) (Nos. 01-3034, 01-3035).

¶8 Gary first contends that the criminal history evidence was not relevant to the issues of fact addressed by the jury. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. He also contends that the evidence, if relevant, should have been excluded under WIS. STAT. § 904.03 because its probative value is substantially outweighed by unfair prejudice. According to Gary, the unfair prejudice arises because the jury was informed through the presentation of his criminal record that he was a registered sex offender, "a child molester and a violent man," and that the evidence would wrongly focus the jury on Brittany's best interests rather than on the TPR grounds.

¶9 The County cites to ***State v. Quinsanna D.***, 2002 WI App 318, ¶¶21-23, 259 Wis. 2d 429, 655 N.W.2d 752, *review denied*, 2003 WI 16, 259

Wis. 2d 105, 657 N.W.2d 709 (Wis. Jan. 17, 2003) (Nos. 02-1919 and 02-1920), as addressing the admission of prior crimes evidence in TPR trials. Gary argues that ***Quinsanna D.*** is distinguishable because Quinsanna's criminal acts and incarceration occurred after her children were born, and after their removal from her care. Here, all but one disorderly conduct offense occurred prior to the CHIPS out-of-home placement of Brittany. We are satisfied that ***Quinsanna D.*** addresses the evidentiary issues raised by Gary.

¶10 ***Quinsanna D.*** holds that in TPR cases, evidence of a parent's criminal record is not governed by WIS. STAT. § 906.09 (use of criminal convictions for impeachment on credibility) where the evidence is relevant to whether the parent is able to assume parental responsibility for the child(ren). ***Quinsanna D.***, 259 Wis. 2d 429, ¶20. The conditions for the return of Brittany to Gary's care were imposed by court order on May 8, 2001. Gary was incarcerated in August 2002 and remained incarcerated in the Outagamie county jail on the date of the TPR trial, April 14, 2003. Gary's incarceration continues until December 2003, eight months after the TPR trial. We are satisfied that Gary's criminal conduct, resulting in his incarceration during the CHIPS dispositional period, at the TPR trial, and for several months after the TPR trial is relevant to his ability to assume parental responsibility and to provide a safe home for Brittany.

¶11 ***Quinsanna D.*** further instructs us that where criminal history evidence is introduced to prove that a parent is failing to assume parental responsibility for a child, the evidence is not subject to a WIS. STAT. § 904.04 analysis ("other acts" evidence is not admissible for the purpose of proving that a person acted in conformity therewith on a prior occasion). ***Quinsanna D.***, 259 Wis. 2d 429, ¶26. In a TPR case, when the reason a parent is not physically available to assume parental responsibility is due to incarceration for willful

criminal acts, such reason cannot be ignored as evidence of parental responsibility. ***Id.***, ¶23 (citing ***L.K. v. B.B.***, 113 Wis. 2d 429, 445, 335 N.W.2d 846 (1983)). We cannot "ignore the fact that any roadblock to establishing a [parental] relationship with [the child] caused by [the parent's] arrest, bond, and conviction was produced by [the parent's] own conduct." ***Quinsanna D.***, 259 Wis. 2d 429, ¶23 (citing ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 685, 500 N.W.2d 649 (1993)).

¶12 Here, as in ***Quinsanna D.***, Gary's criminal history evidence and incarceration were used to show that he is unable to meet the conditions for the timely return of Brittany to his care. It is axiomatic that Gary could not meet the condition of establishing a safe home for the return of Brittany to his care while he was incarcerated. As Dr. Kristine Nehring, a clinical psychologist, testified, "if [Gary is] in jail, he's not going to have a house to do any in-home parenting."

¶13 Gary relates that all of the offenses except the last disorderly conduct charge occurred before Britanny was born. Therefore, he argues, his prior criminal history was exceedingly more prejudicial than probative. The circuit court, after determining that the evidence of criminal offenses and sentences prior to Britanny's birth was relevant, agreed that the evidence was prejudicial, but determined that the probative value outweighed the potential prejudice. The court's reasoning is consistent with ***Quinsanna D.***'s rationale for the admission of prior criminal evidence in TPR cases.

¶14 Gary's probation and parole agent, Sue Sucharski, told the jury that Gary was incarcerated for "something like 1,730 days. About 49 percent. So out of 10 years about five years he was in jail or prison." Such evidence, arising out of Gary's past as well as present criminal involvement, is relevant to the probability of Gary meeting the CHIPS order conditions for the return of Brittany

to his care. While Gary's incarceration covers time prior to the birth of Brittany, and prior to her CHIPS out-of-home placement, the incarceration is the result of Gary's own conduct that cannot be ignored as a potential "roadblock to establishing a [parental] relationship" sufficient for the return of Brittany to his care. ***Ann M.M.***, 176 Wis. 2d at 685.

¶15 Last, Gary specifically objects to the jury being advised of the two 1991 sexual assaults on a child and of his status as a registered sex offender. Winnebago county social worker Christine A. Baganz testified that "when Gary became involved with Probation and Parole in February of 2002, he was ordered to complete a sexual offender evaluation as was determined by his probation agent." According to Baganz, the reason for the evaluation was "due to the fact that Gary is a registered sex offender in the State of Wisconsin."

¶16 Probation and parole agent Sucharski testified that Gary was ordered to have a "psychosexual evaluation" on April 11, 2002, and that he never reported for or rescheduled the evaluation. Sucharski stated that the evaluation was recommended because Gary "had had the two prior sex offenses in his past and the victims were 14 and 16. We had a little concern of him having contact with his minor children. We wanted to know whether or not he posed any threat to him having any type of contact with them unsupervised."

¶17 Gary complains that the psychosexual evaluation, ordered by his probation agent, was not a specific condition of the CHIPS order. He is correct. However, the County points out that the CHIPS order conditions included a requirement that Gary "[r]esolve all criminal charges and cooperate with officials and/or your probation or parole officer." We conclude that the evidence was relevant to Gary meeting the CHIPS order cooperation condition cited to by social

worker Baganz for the return of Brittany to Gary's care, and that the probative value of the evidence in determining parental responsibility was not outweighed by the prejudice the evidence created. Had Gary cooperated and subjected himself to the psychosexual evaluation, the circuit court may have determined that the evidence was not admissible. However, under the circumstances here, the admission of the 1991 sexual assault evidence was not an erroneous exercise of discretion.

¶18 In sum, the circuit court articulated a reasonable basis for the admission of Gary's prior criminal record consistent with the law and rationale presented in ***Quinsanna D.*** Gary's criminal history was relevant as to whether he had met, or could timely meet, the CHIPS order conditions for the return of Brittany to his care. The court properly balanced the prejudicial effect and the probative value of the evidence as required under WIS. STAT. § 904.03. Accordingly, we hold that the circuit court properly exercised its discretion in admitting the evidence for consideration by the jury and affirm the circuit court order terminating Gary's parental rights to Brittany.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.